United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-1194

(To Be Argued by Howard A. Heffron)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT L. WOLF,

Appellant.

Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT

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THE CADILLAC PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1200

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered against appellant, Robert L. Wolf, following eight days of trial before the Honorable Inzer B. Wyatt and a jury, ending November 27, 1973. In an eight-count indictment filed May 24, 1973 (J.A. 3-4),[1]

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[1] "J.A." refers to the Joint Appendix. Pursuant to a stipulation of the parties, all references to the trial proceedings are to the original trial transcript (hereinafter, "Tr.").

defendant Wolf had been charged in Counts 1-4 with wilfully and knowingly attempting to evade and defeat federal income taxes due and owing for 1966, 1967, 1968, and 1969, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. §7201, and in Counts 5-8 with wilfully and knowingly making and subscribing federal income tax returns for 1966, 1967, 1968, and 1969, which he did not believe to be true and correct, in violation of Section 7206(1) of the 1954 Code, 26 U.S.C. §7206(1). Defendant was found guilty as charged on all counts and, on January 18, 1974, was sentenced on the first four counts to concurrent terms of imprisonment of two years, of which two months was to be in a jail or treatment-type institution, the remainder of the sentence of imprisonment was suspended, and defendant was placed on unsupervised probation subject to the standing probation order of the court for two years. He was then sentenced on each of the last four counts to consecutive fines of $1,000, for a total fine of $4,000 (J.A. 2).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, when in open court before the assigned trial date defendant made the unchallenged representations that his defense counsel lacked trial experience, had failed to prepare adequately for trial, and was hostile to and in conflict with the defendant, the trial judge violated defendant's Sixth Amendment right to counsel of his choice by refusing to inquire into the matter and by denying defendant a reasonable postponement of the trial to enable him to retain new counsel, thereby forcing defendant to go to trial with counsel whom he did not want and in whom he had no confidence.

2. Whether, in a case in which key government witnesses had an interest in the result of the prosecution and in

which their credibility had been challenged, the charge to the jury was fundamentally unfair since it singled out the defendant's interest and credibility and did not balance that emphasis by referring explicitly to the interest and credibility of the government witnesses as well.

STATEMENT OF THE CASE

1. *Defendant's Attempt To Obtain a Postponement of the Trial In Order To Secure New Counsel of his Choice.* Nine days before trial, by letter addressed to the judge,[2] and again, six days in advance of trial, in open court, defendant Wolf expressed personal dissatisfaction with his retained defense counsel, on the basis of the counsel's lack of trial experience, his failure to prepare adequately for trial, and the increasing disagreement, conflict, hostility, and failure of communication between them.[3] The district judge refused to inquire into these matters, denied any continuance to enable the defendant to secure counsel, and ruled that the highly complicated eight-count, tax-fraud indictment, based on a bank-deposits theory, would be tried as scheduled, six days hence, with or without the presence of a defense lawyer.

On the assigned trial date, Dr. Wolf addressed the court for the third time, stating additional reasons for changing counsel and requesting a thirty-day continuance for that purpose (Tr. 2). The judge again refused to grant any adjournment, insisting that the trial proceed with the defendant either representing himself or being represented by the

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[2] Letter from Robert L. Wolf to Judge Wyatt, dated November 4, 1973 (J.A. 10-11).

[3] Five days prior to defendant's letter, the trial judge had been informed by defense counsel of defendant's desire to change lawyers. *See* letter of Murray Appleman to Judge Wyatt, dated October 30, 1973 (J.A. 6).

attorney whose replacement he had sought. Defendant thereupon proceeded to trial with the attorney as his counsel.

(a) *Defense Counsel's Lack of Trial Experience.* In his letter addressed to the judge, defendant stated that "I have only now learned that my present attorney has had an absence of trial experience . . ." (J.A 10). At the pretrial conference in open court, three days later, defendant amplified that he had only recently "learned that my present counsel has never tried a tax case, and I am not even sure whether he has ever tried any case in the court." To which the court replied without any further inquiry: "That does not necessarily mean a thing" (J.A. 23). Dr. Wolf replied (J.A. 23-24):

> "I just call this to your attention to establish the fact that in order for me to have, I feel, a fair and impartial trial where all facts relevant to my innocence and truthfulness are brought out, that it would certainly be of great help to have a man who is skilled and knowledgeable from prior experience in court action."

Defendant then brought to the court's attention that his present counsel had never tried a case in the federal district court since he had only become a member of the bar of the court on the day after the indictment had been returned (J.A. 24).[4] Again, without further inquiry, the court responded that "[t]hat does not have the slightest bearing in the world" (J.A. 24).

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[4] The files of the District Court reflect that defendant's counsel swore to his moving affidavit, filed his motion for admission to practice, and was admitted to practice in the District Court all on May 25, 1973, one day after the indictment had been returned.

Defense counsel stood mute before the court when his client lodged these charges, although the court gave him the opportunity to advise both the defendant and the court of his trial experience, if any (*see* J.A. 26). Counsel, however, volunteered no information on the subject, and the government counsel said nothing.

Subsequently, on the opening day of trial, defendant provided the court with the additional information that he had only just learned that "Mr. Arnold Wallach, the legal associate to Mr. Appleman, with experience in criminal law resigned yesterday and will not be present as scheduled" (Tr. 2). Mr. Appleman did not challenge this statement.

(b) *Defense Counsel's Lack of Trial Preparation.* In his letter to the court, defendant further pointed out that defense preparations had not been completed (J.A. 10-11).[5] At the pretrial conference, he stated that the defense investigation of third-party sources of reimbursement were substantially incomplete (J.A. 16-17); that efforts to gather financial records which had been dispersed in the course of his multi-year matrimonial litigation were not completed (J.A. 18-19); that no counter-analysis to meet the government's case based on the bank-deposits method had been

[5] In his own letter to the judge, defense counsel observed "that compliance with the discovery and inspection requested at the inception of this case was first complied with on or about October 12, 1973. Subsequently, after intensive discussions with Dr. Wolf, who at that time was first able to consider and recognize the extent of the government's case, a decision was made that he wants Louis Bender, Esq. as trial counsel. The defendant has indicated that if the government's case had been disclosed sooner, he would have been able to make this decision [of changing counsel] at an earlier date and thus [would have] been able to avoid the necessity for this request for adjournment of the trial date presently scheduled for November 13, 1973" (J.A. 6).

prepared for any of the tax years in question (J.A. 19); that the total time that he had spent with his counsel in preparation had not exceeded 10 to 12 hours (J.A. 19); and that the crucial witness – the accountant who had prepared the tax returns in question – had not been interviewed by Wolf's lawyer (J.A. 21). Defense counsel, with every opportunity to do so, did not take issue with these detailed charges of lack of preparation, cited only the number of conferences purportedly held with defendant (J.A. 26), and, at that, did not challenge defendant's estimate of the minimal conference hours involved.

On the opening day of trial, defendant further advised the court that the defense had not engaged an outside accountant until only three days ago, had still not interviewed defendant's accountant or bookkeeper, and had not consulted witnesses familiar with defendant's matrimonial and other problems for pertinent information (Tr. 2). Again, defense counsel did not take issue with these assertions of the lack of defense trial preparation.

(c) *Conflict Between Defense Counsel and Defendant.* In his letter to the court, defendant also noted that serious disagreements had arisen with his counsel, which had made the "lawyer-client relationship untenable" (J.A. 11). At the pretrial conference, defendant registered his extreme dissatisfaction and loss of confidence in the counsel whom he said he had repeatedly requested to prepare for trial and who had not done so (J.A. 19). He stated expressly that "there has been a growing hostility and air of disagreement between myself and my counsel" and that "the disagreements that have arisen . . . are many faceted" (J.A. 21).

The court responded that it was "not concerned with that" and, if defendant wanted another lawyer, he was perfectly at liberty to get one, but that "on next Tuesday, November 13 . . . the trial commences" (J.A. 22). When

the defendant subsequently tried to explain the reasons for the disagreements with counsel, the court refused to hear him or to inquire into the subject, stating that it would "rather not get into that matter": "I am not passing any judgment on whether you are right, Mr. Appleman is wrong, or vice-versa . . ." (J.A. 22).

In a letter addressed to the judge one day following defendant's letter, defense counsel confirmed the conflict between himself and his client (J.A. 8):

> "I have been recently informed that a letter from Dr. Wolf was delivered to Judge Wyatt's chambers stating that he did not want me to represent him. Therefore I, in good conscience based on his present attitude and behavior, cannot render the proper representation to which he is entitled.

During the course of the conference, six days before the assigned trial date, defense counsel also confirmed defendant's assertions. On one occasion, he sarcastically stated, "Also, your Honor, it is apparent that *the good Doctor* will not listen to my recommendations" (J.A. 26) (emphasis added). As the hearing drew to a close, he added: "Your Honor, the only thing that we have here is a failure of communication between the Doctor and myself which I cannot seem to breach, and I think that is our basic problem" (J.A. 29).

Despite this open conflict, the court ruled: "I am not requiring that you have Mr. Appleman, but if you don't have a lawyer next Tuesday, then we will have to go to trial without a lawyer" (J.A. 22). The court further stated to defendant's counsel, Mr. Appleman (J.A. 23):

> "[U]nder the circumstances I am obliged to ask you to be here during the trial, available for Dr. Wolf to consult. If he does not want to consult you, he does not have to. But I want the record to show that at my request you were present and available."

(d) *Defendant's Attempt To Secure New Counsel.* In the response to the letters from defendant and defense counsel (J.A. 9, 12), at the pretrial conference (J.A. 14), and again at the beginning of the trial (Tr. 2-3), the judge's position on defendant's request was essentially that defendant had every right to "change counsel, he can select any lawyer that he wants to represent him, but the lawyer selected has to be ready to proceed to trial on next Tuesday, November 13" (J.A. 14). Defendant responded (J.A. 25):

> "[D]uring the past days I have interviewed counsel, in fact several counsel, up to and including even this morning, all of whom will be willing to try this case provided time is given them for preparation of the case. Without this preparation time, your Honor, these attorneys have told me, of course, that their participation would be useless.[6]
>
> "I believe it is apparent from what I have told you that this delay which I crave is not for the purpose of obtaining any time which to me, since the beginning of these proceedings,

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[6] In his initial letter to the judge, defense counsel similarly stated: "I was informed . . . that . . . [the defendant] desires Louis Bender, Esq. . . . to be trial counsel. . . . I have been notified by Louis Bender, Esq., that solely due to prior commitments, he cannot accept the present trial date and thus would only consent to be trial counsel if an adjournment can be had" (J.A. 6).

> has been an agony, but for the purpose of gathering together the truth for the purpose of presenting these truths to the Court in an honorable way so that my innocence could be established and that I could live in the future with honor."

In reply, the court could only say (J.A. 26):

> "I propose to see that the trial is fairly conducted and that you are given every opportunity to establish your innocence. But the trial has to commence as scheduled on Tuesday, November 13."

The court thereupon ruled (J.A. 27):

> "[U]nder all the circumstances and considering the directives under which we operate, but also considering fully the points that you have made here this morning, I have got to direct . . . that the trial go on."

2. *The Evidence of Record Concerning Defense Counsel's Conduct of the Trial.* Defendant's concern about his counsel's lack of trial experience and failure to prepare adequately for trial, as well as his concern about the increasing hostility, conflict, and failure of communication between them, was borne out as the eight-day trial unfolded. Astonishingly, defense counsel had not taken the fundamental step of having defense experts prepare and present a counter-analysis of bank deposits; nor did he have any coherent defense theory or approach.

(a) *Defense Counsel's Lack of Trial Experience and Skill.* From the first witness to the last, defense counsel betrayed inexperience and inability to cope effectively with documentary evidence, to formulate questions for

cross and direct examination, and to offer correctly appropriate objections and motions to strike.[7]

(1) *Documentary Evidence.* During the examination of the first government witness, Benjamin Edelstein, defendant's accountant, defense counsel showed that he did not know the mechanics of offering a document into evidence. The court thereupon instructed counsel on how to proceed (Tr. 81):

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[7] This ineptitude was not offset by the fact that a Mr. Max Fruchtman, a practicing trial attorney (Tr. 55), sat in "occasionally" (Tr. 56). He had not been retained by, and was not known to, the defendant, and his role was never defined. Indeed, when Fruchtman first appeared in the courtroom during the trial, defendant addressed a note to his counsel asking: "Who is the spectator?" To which counsel wrote: "Max Fruchtman – Experienced Trial Counsel." Fruchtman did not enter an appearance (*see* J.A. 1-2). He never asked a question, voiced an objection, or addressed the court or jury. There is no indication that he ever consulted with defendant or his attorney. The record indicates that only during the first four days of trial was Mr. Fruchtman "in and out of the courtroom" (Tr. 57). After having been introduced to the jury (Tr. 57), he appeared again just prior to the testimony of Mr. Cavanagh, an accounts payable supervisor for ITT (Tr. 162), continued to remain through part of the direct examination of the Barclays Bank representative, Mr. Zeiss (Tr. 186), but left midway during the examination (Tr. 197). Thereafter, during the direct examination of the Chemical Bank witness, Mr. Burke, Mr. Fruchtman again reappeared (Tr. 225) and remained on for the rest of the second day. At the beginning of the afternoon of the third day, Fruchtman again appeared during the testimony of defendant's former secretary, Rita Milcznski (Tr. 312) and again left during the cross-examination of Benjamin Edelstein, defendant's accountant (Tr. 385). Midway during the direct examination of the last witness on the fourth day, the IRS agent, Morris Skolnick, Fruchtman reappeared for the last time (Tr. 499). The record offers no other indication of Mr. Fruchtman's role.

"Q. . . . Is this in your handwriting, sir? A. That is right, yes, sir.
"MR. APPLEMAN: I would like to have this marked –
"THE WITNESS: Can I clarify it?
"Q. Is it in your handwriting? A. Yes, but –
"THE COURT: Do you want to offer it in evidence?
"MR. APPLEMAN: Yes.
"THE COURT: Show it to Mr. Lawyer.
"MR. LAWYER [Prosecutor]: No objection.
"THE COURT: All right, without objection it will be received.
"THE WITNESS: That is instructions.
"(Defendant's Exhibit A [J.A. 34] was received in evidence.)"

Time and time again, Mr. Appleman forgot these instructions as to mechanics and had to be reminded by both court and prosecutor that a document had to be offered in evidence before it could be used and that it had to be shown to the prosecutor before it could be put into evidence. Thus, with respect to Defendant's Exhibit C (J.A. 35), defense counsel, after having it marked for identification asked defendant's former secretary (Tr. 320) (emphasis added):

"Q. Look at this letter, Defendant's Exhibit C, and see if you typed it? A. Immediately I recognize it. There are my initials (indicating).
"Q. In other words, you typed this letter which says:
" 'Dear Ben:
" 'Enclosed are the tax forms' –
"MR. LAWYER: *Objection, is it going to be offered or not?*
"MR. APPLEMAN: I will offer this in evidence.
"MR. LAWYER: *May I see it?*
"MR. APPLEMAN: Yes.
"MR. LAWYER: I fail to see the relevancy, but I consent to it going in any way.

"THE COURT: All right, without objection it will be received."

A similar development occurred following the marking of Defendant's Exhibit G (J.A. 38; *see* Tr. 363) (emphasis added):

"MR. LAWYER: *I object unless I first see the document.*
"THE COURT: All right, show it to him.
"MR. LAWYER: All right, I will withdraw the objection.
"Q. I wish to call your attention to (b) which has the heading 'Duties and Restrictions Relating to Practice Before the Internal Revenue Service,' and I request that you read to the jury Item 10.22.
"MR. LAWYER: I object.
"THE COURT: *It is not in evidence. The objection has to be sustained.*
"MR. APPLEMAN: I wish to place this in evidence, your Honor.
"MR. LAWYER: I object.
"MR. APPLEMAN: This is a government document.
"THE COURT: *That doesn't mean anything.* I will take it for what it is worth, all right. Objection overruled. Mark it."

More fundamentally, as indicated with Defendant's Exhibit G (J.A. 38), counsel was unable to comprehend that a foundation had to be laid before a document could be received into evidence. This failing was especially highlighted with respect to Defendant's Exhibit N (J.A. 40-42), which defense counsel attempted to offer in evidence through a government witness, a Special Agent of the Internal Revenue Service (Tr. 684) (emphasis added):

"MR. APPLEMAN: Please mark this as Defendant's Exhibit N for identification.
"[Defendant's Exhibit N marked for Identification]

"Q. Is that a request for travel funds from Searles?
"MR. LAWYER: I object to the form.
"Q. What is the document? A. It is captioned 'Remittance Advice', and it says travel advance Basle, Switzerland.
"MR. LAWYER: I object. We have this continuous train of copies of documents that this witness has never seen.
"THE COURT: *Is this a document in evidence?*
"MR. LAWYER: *No, sir, the last one was not either.*
"MR. APPLEMAN: Offered simply for identification.
"THE COURT: Do you want to offer it?
"MR. APPLEMAN: Yes.
"THE COURT: Has it been identified? What is it?
"MR. APPLEMAN: This is a request for travel funds from Dr. Wolf to Searles for travel to Basle, Switzerland.
"THE COURT: *Does it come from his files, Mr. Appleman?*
"MR. APPLEMAN: *No.*
"THE COURT: *How can he identify it? How can you lay a foundation thru him?*[8]

Once an exhibit was received into evidence,[9] defense counsel did not realize that it could be read to the jury in part or in its entirety. Instead, counsel attempted over and over again to present the content of the document to the jury by means of inappropriate questions posed to

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[8] Counsel then abandoned this inept effort to introduce evidence which might have shown that a non-income item had improperly been included in the government's bank deposits-analysis. The incident highlights the defense's lack of preparation (*see also* Tr. 713, 781-82).

[9] As for his actions with respect to government documents, counsel rarely objected to their admissibility, and even when he did, such as when he raised a question as to the authenticity of certain copies of original documents, he apparently did not realize that he could request a *voir dire* to explore the issue (*see* Tr. 144).

the witness – a practice which the court refused to accept (*see* Tr. 65). The court therefore frequently reminded counsel of his right to read the document to the jury. Thus, counsel began asking the accountant questions about Defendant's Exhibit A (J.A. 34) after it was received into evidence (Tr. 81-82):

> "Q. In other words, you instructed the doctor to present to you stock transactions, bank deposits, savings bank deposits and –
> "THE COURT: No, the document is in evidence. If you want to read it to the jury you can read it to the jury, but there is no use in asking him what it says.
> "MR. APPLEMAN: All right, your Honor. Sorry.
> "(Mr. Appleman read from Defendant's Exhibit A.)"

Similarly, with respect to Defendant's Exhibit H (J.A. 39), counsel asked the accountant (Tr. 372):

> "Q. Will you please tell the jury in essence what this letter states?
> "THE COURT: No.
> "MR. LAWYER: Objection.
> "THE COURT: Certainly not. You can read that to the jury if you want to.
> "(Mr. Appelman read from Defendant's Exhibit H to the jury.)"

Other admonishments of the court included:

> – "It is in evidence. He can't tell us any more about it than you can tell or the jury can tell or I can tell" (Tr. 641).
>
> – "It is perfectly proper and normal argument that can be made to the jury, but there is nothing that this witness can add to the situation. You are just asking him from documents that are in evidence what are essentially argumentative questions." (Tr. 658)

The problem of refreshing a witness' recollection through the use of a memorandum proved too difficult for defense counsel to accomplish without step by step instructions from the court. Thus, during his cross-examination of Mr. Edelstein, defendant's accountant, counsel immediately asked the witness to read the memorandum (D. Ex. J) before laying the proper foundation (Tr. 383-86) (emphasis added):

"Q. Will you please read this memorandum of interview and see if it refreshed your recollection as to what occurred on that day?
"MR. LAWYER: Objection.
"THE COURT: Yes, of course. *Ask him what happened.* You haven't asked him what happened. It may be eventually possible to read it, but *first you have to ask what they say. If he can't remember, then of course it is proper to show it to him.*
"Q. What occurred on that date? A. We discussed the matter. What we discussed I wouldn't – I couldn't remember.
"THE COURT: All right, *now ask him a question and then if he can't answer it, then show him the document.*
"Q. Do you remember if at any time one of these Special Agents handed a document to you? A. I don't remember.
"THE COURT: All right, *now you can show it to him and ask him to refresh his recollection.*
"A. What is it you want to know?
"Q. Did Special Agent Skolnick –
"THE COURT: *Look at any of the document and see if, having looked at the document, it refreshes your recollection so that you can put it aside and now testify to what happened.*
"THE WITNESS: I'm sorry.
"THE COURT: *Just read it to yourself.*

* * * *

"A. Yes, I read it.

"Q. Does that refresh your recollection, sir?
"THE COURT: Can you put it down now and answer the question as to whether they showed you a document?
"THE WITNESS: I don't remember. I can't tell.
"THE COURT: All right, it doesn't refresh his recollection."

Having been thoroughly instructed on how to refresh a witness' recollection during the cross-examination of accountant Edelstein, defense counsel again was presented with the task during IRS Agent Skolnick's cross-examination. Once again, however, he proved unequal to it, and the prosecutor and court had to step in (Tr. 696) (emphasis added):

"Q. I refer to page 18 of your special agent's report. After refreshing your recollection –
"MR. LAWYER: Objection.
"Q. Will you please refresh your recollection –
"MR. LAWYER: *There has been no question put to him as to which he has to refresh his recollection.*
"THE COURT: All right.
"Q. Would you please refresh your recollection as to what occurred on July 21, 1971 with regard to you[r] telephone conversation with Mr. Edelstein?
"THE COURT: I think Mr. Lawyer has a good point. *Why don't you ask him the question. That will indicate whether or not he needs to have his recollection refreshed.*
"Q. Did you have a telephone conversation with Mr. Edelstein on July 21, 1971? A. Yes, I did."

In like manner, counsel also showed his lack of knowledge of how to use grand jury minutes to impeach a witness properly. His questions were posed improperly. Thus (Tr. 100-01) –

"In April of 1973, before the grand jury the question was asked of you –

"THE COURT: I think the proper form of the question is: Was this question asked and was this answer given."

Counsel also attempted to impeach Agent Skolnick's testimony through use of the grand jury testimony, not of Mr. Skolnick, but of the accountant, Mr. Edelstein. The court rejected the attempt as improper (Tr. 697) (emphasis added):

"Q. Sir, Mr. Edelstein in his testimony before the grand jury on April 13, 1973, stated –
"MR. LAWYER: Your Honor, *this is really improper.*
"THE COURT: Yes.
"MR. APPLEMAN: This would show that Mr. Edelstein had no knowledge of this alleged telephone conversation.
"THE COURT: *Asking this witness about grand jury testimony of Mr. Edelstein is entirely improper* and the objection is sustained. Now, let's go on."

Counsel failed to recognize that a document produced by the government witness, Edelstein, defendant's accountant, in response to his request was not the requested material. Thus, accountant Edelstein testified that defendant had furnished to him in each of the four tax years in issue a signed paper to the effect that the return had been prepared on the basis of information supplied by the defendant and that he had given copies to the IRS Agents and had the originals in his records (Tr. 108, 110, 120). Counsel had neither sought pre-trial discovery nor subpoenaed these papers, and the judge instructed the witness to bring them to court (Tr. 120). Instead, the witness produced Defendant's Exhibit E (J.A. 36), a paper signed in 1970, and not during the tax years in question (*see* Tr. 352-53). Counsel did not become aware of this discrepancy until the last minute and then did not pursue on cross-examination the matter of these crucial missing papers, which so plainly bore on the issue of knowledge and intent (Tr. 393-94).

(2) *Cross-Examination.* One of defense counsel's basic problems was his failure to understand how to make his point to the jury by the question and answer technique. Thus, he would occasionally pose a number of questions at once, making his train of thought difficult to follow (*see, e.g.*, Tr. 319-20). He would further intersperse his questions with statements or comments which were thereupon challenged by the prosecutor and thrown out by the court (*see, e.g.*, Tr. 87-88, 101, 154-55, 690). An example of this type of cross-examination occurred when defendant's former secretary was on the stand (Tr. 331-33) (emphasis added):

"Q. We are again referring to the special agent interview of June 15, 1972.
"Was this question asked and was this your answer:
" 'Q. What specific instructions did Dr. Wolf give you with regard to the recording of the fee income?
" 'A. Are you again referring to when patients give checks in full? None.'
"*Naturally, your grand jury testimony is otherwise.*
"THE COURT: *I am afraid I can't allow the question to contain a statement or comment, Mr. Appleman. I am afraid we will have to start over again. Just ask a question.*
"MR. APPLEMAN: That is what I am looking for, your Honor.
"Q. From the grand jury:
" 'Q. Was it part of your duties to make entries on the books and records of Dr. Wolf's medical practice?
" 'A. Yes, sir.'
"Was that the answer? A. Yes.
"Q. *I am a little perturbed with regard to the testimony –*
"MR. LAWYER: Objection.
"Q. *– to the grand jury.*
"MR. LAWYER: I object to a remark like that.
"THE COURT: *Mr. Appleman, I am afraid I can't*

permit statements or comments. We have to ask a question, an inquiry, an interrogatory.

"Q. Before the grand jury:

" 'Q. And you remember back some time around 1966, whether during the course of the Internal Revenue Service audit Dr. Wolf asked you to change some of the sheets in the book?

" 'A. Yes, sir.'

"Is that the answer you gave Mr. Tigue? A. Yes.

"Q. *In all of the prior questions before the grand jury there was no reference made –*

"THE COURT: No, no, Mr. Appleman.

"MR. LAWYER: Objection.

"THE COURT: *I cannot permit statements.*"

Counsel often failed to pursue relevant lines of inquiry (*see* Tr. 764-66), and, even when he did, he did not understand the need to lay a foundation to show relevance and found it difficult to formulate questions that could withstand objection.[10] The record is rife with examples: in some instances going on for pages (*see, e.g.*, Tr. 331-33, 688-90).[11] Thus, during cross-examination of the secretary, counsel asked (Tr. 341-42):

"Q. After the separation [of the doctor and his wife] was the doctor out of his office a great bit of time?

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[10] Counsel apparently recognized that it would be helpful to establish that defendant's cashing of checks need not have stemmed from fraudulent intent. His technique, however, was so deficient that he could only frame the plainly objectionable question, "Is it a violation of any section of the Internal Revenue Code to cash checks?" and then when the objection was sustained, he dropped the matter (Tr. 623).

[11] On one occasion after a number of objections to one form of counsel's questions were sustained, the prosecutor went to the length of suggesting to defense counsel how to phrase the question (Tr. 660).

"MR. LAWYER: Objection.
"THE COURT: Sustained.

* * * *

"Q. Did you ever see the doctor's wife after the separation in his office?
"MR. LAWYER: Objection.
"THE COURT: Sustained.
"Q. Do you know if subsequent to the time of separation the doctor's wife assisted him in the preparation of any records?
"MR. LAWYER: Objection.
"THE COURT: Sustained.
"Q. For the years 1966 through 1969 when you did not report the income earned from the doctor, did you file amended returns, did you yourself file amended returns for these years? A. No.
"Q. Do you know that you owe a tax for the income earned from the doctor for these years?
"MR. LAWYER: Objection.
"THE COURT: Sustained."

During cross-examination of IRS Agent Skolnick, counsel's lack of skill prevented him from making an important defense point – that the defendant had supplied his accountant with information to prepare returns reflecting substantially a greater amount of income than was reported but that the accountant had failed to include certain items (Form 1099 income) in the computation. Thus, the government's objections as to the form of counsel's questions were continually sustained (Tr. 636-40):

"Q. The question is this: According to this statement which was prepared by Mr. Edelstein for Mr. Wolf's signature, it states that in 1966 –
"MR. LAWYER: Objection.
"THE COURT: Yes, you are now stating the evidence on the record. You may be right, but I can't tell and therefore I have to sustain an objection as to form.

"Q. The sales set forth in Defendant's Exhibit E [J.A. 36] for the year 1966, which is $30,116.52, which you have just testified corresponds to the Schedule C as reported on Defendant's 1966 income tax return 'does not include W-2's and 1099's issued to me'; is that correct, sir? A. That is correct.

"Q. Therefore in order to arrive at a proper figure for the income of the taxpayer in the year 1966 it is necessary to add on to this figure shown on Defendant's Exhibit A the W-2's received from the salary of Mt. Sinai and the 1099; is that correct, sir?

"MR. LAWYER: Objection to form.

"THE COURT: Yes, sustained.

"Q. What is a Form W-2? A. A Form W-2 shows an individual's earnings during a particular period, either a particular year –

"Q. In other words, no further record need be kept with regard to that if a W-2 is issued to you; is that correct?

"MR. LAWYER: Objection to form.

"THE COURT: Yes, sustained."

Counsel's lack of understanding of the fundamentals of trial practice was shown by his suggestion that the testimony of a proposed witness (a patient of the defendant who had *not* been called by the government) – to the effect that he had been pressured to testify as a government witness – could be used to impeach the testimony of other government witnesses who had already completed testifying (Tr. 764-65). The judge quite properly refused to allow this proposed defense testimony and admonished defense counsel, "Why didn't you ask them [the other government witnesses]? You could ask them. I didn't restrict cross-examination" (Tr. 765).

(3) *Objections and Motions To Strike.* Counsel objected to questions or to the admission of evidence without offer-

ing any proper basis or grounds (*see, e.g.*, Tr. 45, 745, 762-63).[12] At times, he objected improperly to a witness giving the substance of a conversation when he could not remember the conversation in detail (*e.g.*, Tr. 52) or voiced an objection in terms that reflected how alien trial advocacy was to him: "I wish to object, your Honor, just based on my experience with Blue Cross and Blue Shield" (Tr. 446).

He showed a similar lack of knowledge as to when a motion to strike was appropriate (*see* Tr. 323-25). A damaging example of the failure to move to strike occurred while defense counsel was cross-examining defendant's former secretary as to the payments she had received from the defendant for her secretarial services (Tr. 324-25):

"Q. Did the special agent ask you whether you had reported this money you received from the doctor in your income tax return? A. No.
"Q. Never asked you that.
"Were you aware of the fact that this money should have been reported as income?
"MR. LAWYER: I object.
"I withdraw the objection.
"A. Dr. Wolf told me not to report the money I received from him and if I may state further –
"THE COURT: No, no, the question was:
"Did you know that you should report it and did you answer that you did know you should have reported it?
"THE WITNESS: The doctor told me not to report it.

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[12] For example, defense counsel attempted to obtain a ruling barring the government from offering sworn testimony of the defendant at his divorce trial *before* the government made the offer and *before* the substance of the testimony was known. The incident reflected counsel's total lack of trial experience (Tr. 762-63).

"THE COURT: Did you know you should have reported it?
"THE WITNESS: Yes, it should have been reported.
"THE COURT: That is the answer."

Thus, the judge felt compelled to intervene and partially fill the void left by counsel's lack of experience.

(b) *Defense Counsel's Lack of Trial Preparation.* The price defendant paid for his counsel's lack of trial experience was the concommitant lack of trial preparation on the part of the defense. Counsel's failure to set forth a coherent defense theory in his opening statement (Tr. 23-25A) was a harbinger of the trial to follow.[13]

To the day of the trial, defense counsel had made no motions for discovery and had not interviewed critical witnesses (Tr. 2). Further attesting to the lack of preparation, defense counsel had neglected to subpoena any documents. Thus, at trial, during cross-examination of the accountant, certain important documents which defendant himself had signed and submitted to the accountant were not available when counsel wanted them; the accountant was thereby required by the judge to come back to conclude his testimony on another day (Tr. 108-09):

"Q. Do you have the paper which the doctor signed with regard to this item in 1969? A. Yes, I have, and the Treasury Department has too a copy of it.
"MR. APPLEMAN: Can I please have it?
"MR. LAWYER: I haven't got it.
"MR. APPLEMAN: You have no such paper?
"Q. Do you have a copy of that paper? A. Not with me, no. He signs a paper in general stating –

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[13] To be sure, as a former employee of the Internal Revenue Service (J.A. 28-29), counsel demonstrated some knowledge of tax procedure, but he was unable to marshal this knowledge and bring it to bear effectively in the unique structure of advocacy required in a criminal jury trial.

"MR. APPLEMAN: I object to this, your Honor.
"THE COURT: I will permit it. What did he sign?
"THE WITNESS: He signs a paper in general stating that the information he supplied to me and prepared on the return and he signs that paper. That is it.
"THE COURT: Where are the papers that he signed?
"THE WITNESS: I have them in my records.
"THE COURT: All right.
"Do you want them brought here?
"MR. APPLEMAN: Yes.
"THE COURT: Would you bring them here the first thing in the morning?
"THE WITNESS: I couldn't do that, your Honor.
"THE COURT: Why is that?
"THE WITNESS: Because I have so many commitments. I have a heart condition. It is physically impossible for me to do it. I will bring it some other day.
"THE COURT: Can you bring it the day after tomorrow?
"THE WITNESS: Is there any possibility that I can do it some day next week?
"THE COURT: No, you cannot. 9:30 Thursday morning, then."

Counsel had failed to subpoena checks from the defendant's employer, Mt. Sinai Hospital, covering travel reimbursements which might have served to reduce the income shown by the government's bank deposit analysis (Tr. 781-82). Counsel had similarly failed to subpoena certain bank records (Tr. 131-35, 146-47) and IRS records (Tr. 619-20), reflecting again his lack of preparation. The effect of his failure to subpoena was highlighted in mid-trial by his request to a government witness (bank representative) for documents relating to certain savings account transactions which should long before have been subpoenaed and reviewed (Tr. 146-47):

"MR. APPLEMAN: At this time I would like to make a request for all the withdrawals from this account and whether these withdrawals were made by case or check and if made by check, photocopies of the original check.

"THE COURT: Have you subpoenaed these?

"MR. APPLEMAN: I? No, your Honor.

"THE COURT: Does the Government have any objection?

"MR. LAWYER: I do question the relevance. If he didn't subpoena it earlier apparently he didn't consider it relevant. It is just a bank deposits case."

* * * *

"THE COURT: . . . There is no reason on earth why the Government should have asked him to bring it because as far as the Government is concerned it is irrelevant to the Government's theory of the case. If anything, it is part of the defense."

In another instance, defense purposes in cross-examination of a government witness were completely at odds with the defense case. Thus, counsel had attempted to discredit testimony to the effect that defendant's accountant had advised an IRS agent about certain loans made to defendant by his mother during the taxable years involved (Tr. 475-76, 478, 482-84, 601-02). When the time came to put on the case for the defense, however, the defendant's mother was called to the stand and proceeded to testify about the various loans she had made to her son during the years in question (Tr. 756-57).

Another example of inadequate preparation related to defense counsel's attempt to present evidence of defendant's marital difficulties as affecting his state of mind. In his first attempt, the judge rejected out of hand any testimony relating to defendant's marital problems: "That hasn't got a thing in the world to do with . . . [this case]" (Tr. 244). To which counsel could only say, "The mental state of mind, your Honor" (Tr. 244). "Of course, not," the court responded, and counsel, making no further

effort to develop a foundation, dropped the matter (Tr. 245). Later in the trial, another defense attempt to introduce evidence relating to defendant's marital problems met the same fate (Tr. 315-16).

The judge took the unconditional position that proof of marital problems as affecting the defendant's state of mind would only be admissible if a plea of insanity had been entered, but not generally as bearing on "wilfulness" (Tr. 315, 450). Not once did defense counsel ask to make an offer of proof on the issue. The judge did volunteer the opportunity "to make an offer of proof" for a later time (Tr. 316), which counsel subsequently followed up (Tr. 449-50). Even then, however, defense counsel never submitted a memorandum of law on the subject, nor sought to develop a foundation which might have shown that the defendant's financial records had been so dispersed during the years of prolonged and hard-fought marital litigation that he had been unable to maintain complete files from which the year's income and outlays could be accurately reconstructed.[14]

(c) *Conflict Between Defense Counsel and Defendant.* As a direct consequence of the hostility, conflict, and failure of communication between defendant and his counsel (*see* J.A. 21, 26, 29), the prosecutor announced to the court at the outset of the trial that he had been advised by Mr. Appleman that they could no longer enter into certain stipulations concerning documentary evidence. As the prosecution observed: "[Mr. Appleman] . . . feels that

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[14] Even in the absence of a plea of insanity, evidence concerning the defendant's marital problems might have been relevant to explain away certain "hallmarks of fraudulent intent" relied upon by the government, such as inadequate records, number of bank accounts, and transfer of funds, or as part of the defense case to corroborate the defendant's testimony. *See, e.g., Spies v. United States,* 317 U.S. 492, 493 (1943), in which the defendant had been permitted to give "testimony related to his good character, his physical illness

(continued)

it is not in *his interest* as *counsel* insofar as his relationship with Mr. Wolf is concerned" (Tr. 3) (emphasis added).

Throughout the rest of the trial, it became clear that defense counsel was indeed much preoccupied with his own "interest as counsel," rather than with the interest of his client. Thus, just prior to the defendant's taking the stand in his own behalf, counsel approached the bench and stated (Tr. 783):

> "Dr. Wolf is going to take the witness stand totally disregarding my advice. I have specifically advised him not to take the stand, but he insists on taking the stand and I wish this a part of the record."

Defense counsel thereupon proceeded to examine the defendant, who thus testified in his own behalf without the support of counsel of his choice.

Following the charge to the jury, defense counsel took only a single exception to the court's charge. He then proceeded to inform the court that "the defendant had other counsel and other counsel has given him certain instructions" (Tr. 1026). He further advised that "this independent counsel" was Mr. Jules Ritholz, who had "been advising Dr. Wolf throughout this trial" (Tr. 1026-27). Thereupon, Dr. Wolf, without his counsel's assistance, proceeded himself to present various exceptions to the court's charge (Tr. 1027-30).

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[14] (continued) at the time the return became due, and lack of wilfulness in his defaults, chiefly because of a psychological disturbance, amounting to something more than worry but something less than insanity." In the present case, however, defense counsel never followed through on the point (*see, e.g.*, Tr. 345).

3. *The Charge to the Jury on Defendant's Interest.* During the course of its charge to the jury, the court gave the following general instructions upon the credibility of witnesses (Tr. 1020):

> "In passing upon the credibility of the witness you may take into account inconsistencies or contradictions in his or her testimony, conflict with the testimony of another witness, omissions in prior testimony, conflicts with prior testimony such as that before the grand jury, or any prior statement of material matters as to which he or she testified upon the trial.
>
> "The degree of credit to be given a witness should be determined by the demeanor, the relationship to the controversy and to the parties, the bias or impartiality, the reasonableness of his or her statements, the strength or weakness of his recollection viewed in the light of all other testimony and the attendant circumstances in the case."

Following the general charge on witness credibility, the trial court commented on "interest" as it affected credibility (Tr. 1021):

> "If anyone is found by you to have any interest in this matter, this is a factor which you may take into account in determining the credibility of that witness."

Then, taking note that the defendant had testified, the court singled out for discussion only the nature of *defendant's interest* in the prosecution and *his* motive to give false testimony (Tr. 1021-22) (emphasis added):

> "Members of the jury, the law permits but does not require a defendant to testify in his own behalf. This defendant has testified, has

taken the witness stand here. Obviously *a defendant has a deep personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. Interest creates a motive for false testimony. The greater the interest, the stronger the motive, and the interest of a defendant in the result of his trial is of a character possessed by no other witness.* In apprising his credibility you may take the fact of interest into consideration. However, it by no means follows that simply because a person has a vital interest in the result that he is not capable of giving a straightforward and truthful account of events. It is for you to decide to what extent, if any, his interest has affected or colored his testimony.

"*If you find that the defendant gave false statements or caused false statements to be made to Internal Revenue Service agents* in an attempt to clear himself, you may consider whether this is circumstantial evidence pointing to a consciousness of guilt. It may be a reasonable inference that an innocent person does not ordinarily invent or fabricate to establish his innocense. What significance, if any, to attach to such conduct if you find that there was such conduct in this case is, of course, entirely for the jury."

Among the exceptions taken to the charge by defendant Wolf himself was the "exception to the strong way in which . . . [the court had] put the statement that a [defendant's] personal interest in a matter of this nature is indeed the strongest motive . . . for false testimony" (Tr. 1029).

The Court denied the exception and refused to change the charge on the defendant's interest on the ground that

"[t]he exact form of that charge is almost traditional in this courthouse, so I use it frequently" *(id.)*.

ARGUMENT

I.

THE LOWER COURT VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL OF HIS CHOICE BY DENYING A REASONABLE POSTPONEMENT OF THE TRIAL TO ENABLE DEFENDANT TO RETAIN NEW COUNSEL, THEREBY FORCING DEFENDANT TO GO TO TRIAL WITH COUNSEL WHOM HE DID NOT WANT AND IN WHOM HE HAD NO CONFIDENCE.

The trial judge's denial of any reasonable postponement of the trial to enable the defendant to retain new counsel and, in any event, his failure and refusal to inquire into the basis for the defendant's expressed dissatisfaction with his counsel forced defendant to go to trial with counsel whose representation he did not want and in whom he had no confidence.

The judge's statement – "I am not requiring that you have Mr. Appleman, but if you don't have a lawyer next Tuesday [six days later], then we will have to go to trial without a lawyer" (J.A. 22) – did not afford the defendant any reasonable alternative. Defendant had informed the judge that he had consulted with substitute counsel willing to try the case if preparation time were extended (J.A. 25). Six days was patently an inadequate time period for another counsel – no matter how experienced – to prepare to defend against the charges, to review the hundreds of documents, interview the available witnesses, develop an accounting analysis, prepare the defendant to testify in his own behalf, and undertake all the other tasks experienced counsel would have had to do in preparation.

Defendant's dissatisfaction with counsel was well-founded. The record of the trial disclosed that counsel was inexperienced in trial techniques, had failed to prepare for trial as would a skilled trial advocate, and was unable to communicate effectively with defendant.[15] Indeed, it is astonishing that the defense presented no counter-analysis of bank deposits prepared by defense accountants. A major element in defense preparation in a bank-deposits case is the counter-analysis of all deposits to make certain that proper credit for all non-income items has been given and to offer a defense interpretation for questionable items. Here, however, bank records of the defendant's withdrawals which could bear on the issue of non-taxable transfers between bank accounts had not been reviewed or subpoenaed (Tr. 130-31, 146-47); cancelled checks reflecting travel reimbursements paid to the defendant by his employer, Mt. Sinai Hospital, which might have constituted non-taxable deposits, had not been examined or obtained (Tr. 741-42, 782); and, although the government in its case had assumed that United Medical Service payments to the defendants' patients could be treated as payments to the defendant (Tr. 445), counsel had made no effort to obtain the original documentation which would have shed light on whether that assumption was correct in all instances (Tr. 471). In short, neither prior to nor at the trial did the defense concentrate on the most fundamental aspect of any bank-deposits case: the validity of each of the components and assumptions built into the government's bank-deposits analysis.

In these circumstances, the conviction should be set aside and the cause remanded for a new trial at which

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[15] *See* Part 2 of the Statement of the Case, *supra*.

the defendant may exercise his Sixth Amendment right to counsel of his choice.

A. Defense Counsel's Lack of Trial Experience, Failure To Prepare for Trial, and Conflict and Inability To Communicate with Defendant Were Substantial Grounds for a Continuance.

In *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), the Supreme Court stated:

> "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation omitted.] There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

This Court in *United States v. Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966), set forth the critical considerations to be weighed:

> "The exercise of the right to counsel must be balanced with the necessities of sound judicial administration. A speedy trial, also guaranteed by the Sixth Amendment, is a desirable object of the criminal law. . . . At the same time, however, the desire for expedition can furnish no justification for the subversion of the Sixth Amendment right to present an effective defense through counsel."[16]

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16 The court in *United States ex rel. Davis v. McMann*, 252 F. Supp. 539, 545 (N.D.N.Y. 1966), *aff'd*, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968), elaborated on these critical balancing factors: (continued)

We submit that, here, the "desire for expedition" did subvert the defendant's Sixth Amendment right to present an effective defense through counsel of his choice.

"Due process demands that the defendant be afforded a fair opportunity to obtain the assistance of counsel of his choice to prepare and conduct his defense." *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). Moreover, "if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right." *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

Six days before the assigned trial date, the trial judge ruled that "under all the circumstances, and considering the directions under which we operate, *but also considering fully the points that you have made here this morning*, I have got to direct that . . . the trial go on" (J.A. 27) (emphasis added). The background "circumstances" included

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16 (continued)

"The right to counsel is a basic right and the right to choose one's own counsel is a vital element in that right. . . . Court or prosecution conveniences are to be of secondary consideration in the search for the overriding or waiver of this important right. [Citations omitted.] The balancing considerations, troublesome, as noted often, are that the right of counsel cannot be manipulated so as to interfere with the fair administration of justice, but the defendant must have complete confidence in counsel and hence, a change, if it occurs, or even a discharge, will usually point to a continuance."

See generally Giacalone v. Lucas, 445 F.2d 1238, 1240 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972).

the fact that the defendant had never before sought any adjournment of the trial date or, through motions or other tactics, had never sought to bring about a delay in the trial. "[T]he points" that defendant had made included the charges that defense counsel had lacked trial experience, had failed to prepare adequately for trial, and was hostile and in deep conflict with defendant. None of these charges was refuted or even challenged. When the judge chose to rule as he did, on this record, without further inquiry, the ruling had to be that the defendant's unrefuted charges warranted the grant of a reasonable continuance to enable him to obtain new counsel of his choice. The judge's failure to grant any continuance – in spite of the defendant's uncontested representations that he was represented by an inexperienced, unprepared, and hostile lawyer – was reversible error.

There were not present here any of the balancing considerations which have been thought to warrant restrictions upon the exercise of a defendant's right to counsel of his choice. Thus, there was never a suggestion by government counsel or the judge that Dr. Wolf was acting in bad faith, seeking through manipulation of the right to counsel to obstruct the fair administration of justice. *Cf. United States v. Abbamonte*, 348 F.2d 700, 703-04 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); *United States v. Arlen*, 252 F.2d 491, 496 (2d Cir. 1958). Nor was this a case where the government was insisting upon an expeditious trial because its witnesses had come from afar or were about to leave on a long trip. *Cf. United States v. Hall*, 448 F.2d 114, 117 (2d Cir. 1971), *cert. denied*, 405 U.S. 935 (1972). At no time did the government insist that the trial take place on the projected date or voice opposition to a continuance. The witnesses were all from the metropolitan area, and no case of inconvenience, which might have been caused by a continuance, was cited. *Cf. McKay v. Carberry*, 238 F. Supp. 856, 857 (N.D. Cal.

1965). The case was not an old one or a case which had been tried once before, where concern for staleness of evidence would be warranted. *Cf. United States v. Bentvena*, 319 F.2d 916, 934-38 (2d Cir.), *cert. denied sub nom. Ormento v. United States*, 375 U.S. 940 (1963). The indictment had been returned little more than five months earlier. There had been no prior continuances, and the period requested – thirty days – was not unreasonable on its face in light of the nature of the charges. Finally, there was no suggestion that the defendant was at fault in not bringing the matter to the court's attention earlier. He stated that he had only recently learned of the basis for dissatisfaction, and that statement met no challenge.

In these circumstances, we submit that the statements of the Seventh Circuit in *United States v. Koplin*, 227 F.2d 80, 86 (1955), reversing convictions on a three-year-old indictment forced to trial by the trial judge, apply with even greater force here:

> "It is evident that the trial court had his mind made up to place the defendants on trial, right now, irrespective of whether they were represented by counsel, and this on the fallacious premise that the cases are old and must be disposed of immediately. The desire or ambition to dispose promptly of the business of the courts is highly commendable, but it cannot be realized at the expense of the fundamental rights of parties to litigation."

In *United States v. Mitchell*, 354 F.2d 767 (2d Cir. 1966), this Court reversed a conviction where the trial judge had allowed the defendant five days within which to secure a replacement for retained counsel, notwithstanding that the indictment had charged a violation of the Selective Service Act, which contains a legislative directive that such cases be accorded trial precedence. As this Court explained (*id.* at 769):

> "[T]he desire for expedition can furnish no justification for the subversion of the Sixth Amendment right to present an effective defense through counsel."

Since this is precisely what happened in the present case, this Court should follow the directive it set in *Mitchell* by reversing the judgment of conviction and remanding the cause to the district court for a new trial.

B. Defendant's Grounds for a Continuance Were Sufficient To Require the Trial Judge To Conduct a Searching Inquiry into the Basis for Defendant's Claims.

Even if this Court does not conclude that the circumstances compelled the grant of a continuance, the trial judge clearly erred in ruling on defendant's application without first conducting a searching inquiry into the basis of his claims to ascertain whether legitimate grounds existed for them and then taking such action as the record warranted.

In *United States v. Morrissey*, 461 F.2d 666, 669-70 (2d Cir. 1972), this Court ruled that, when a defendant states reasons for his dissatisfaction with counsel, which are serious on their face, "a perfunctory, surface inquiry to determine the truth and scope of his allegations" is insufficient; rather "searching inquiries" into the matter must be made. The Court further held that, "[w]ithout more, this failure to inquire, in our view, would constitute error sufficient for reversal of the judgment of conviction" (*id.* at 670).

The duty of the trial judge to inquire into the basis for defendant's objection to counsel has been affirmed in a variety of decisions. *See, e.g., Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970) ("The problem arises because the state court did not, in our opinion, take the necessary time and conduct such necessary inquiry as might have

eased Brown's dissatisfaction, distrust and concern."); *Sawicki v. Johnson*, 475 F.2d 183, 184-85 (6th Cir. 1973) (remanding because of the judge's failure to hold a hearing); *United States v. Harrelson*, 477 F.2d 383, 384 (5th Cir.), *cert. denied*, 414 U.S. 847 (1973) (affirmance of the disposition below because the district judge had conducted lengthy hearings and had made specific findings regarding the defendant's allegation).

In *United States v. Seale*, 461 F.2d 345, 359 (7th Cir. 1972), the appeals court enforced the trial judge's duty of inquiry: "[S]ince Seale had amply indicated dissatisfaction with counsel, the trial court was under a duty to inquire into the subject" and "to look into the basis of Seale's dissatisfaction." The Seventh Circuit held that the failure to do so was an abuse of discretion (*id.* at 359-60) (footnote omitted):

> "It is immaterial whether Seale had a right to a continuance until Mr. Garry could represent him or had a right to appear *pro se*. What is crucial is that in the circumstances of this case, the trial judge had a duty to inquire of Seale as early as August 27 and no later than September 26, as to his objections to counsel of record and to take appropriate action to make sure that his Sixth Amendment right to assistance of counsel and his right to represent himself were appropriately honored."[17]

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[17] The Court observed (461 F.2d at 359) that Chief Justice Burger, then Circuit Judge, had written in a concurring opinion approved by the *en banc* court that, even "[i]f no reasons are stated, the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until the reasons are known." *Brown v. United States*, 264 F.2d 363, 369 (D.C. Cir.) *(en banc), cert. denied*, 360 U.S. 911 (1959).

Indeed, even when – unlike the case at bar – the issue arises in the context of a possible substitution of counsel in the midst of trial, this Court noted in *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973):

> "If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the *bona fides* of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right."

There can be no doubt that here the issues the defendant raised with respect to counsel were substantial. Indeed the questions the defendant raised concerning his counsel's alleged total absence of trial experience, his appalling lack of trial preparation, and the inability of the two to communicate with each other went to the heart of the matter. As the defendant himself plaintively put it (J.A. 23-24):

> "[I]t would certainly be of great help to have a man who is skilled and knowledgeable from prior experience in court action."

Rather than make a detailed inquiry, all the court did was say it was "not concerned" with the conflict between defendant and counsel (J.A. 22), that it would "rather not get into" the reasons for the disagreements between them (J.A. 22), that questions as to counsel's lack of trial experience did "not necessarily mean a thing" (J.A. 23), and that his complete lack of federal trial experience did "not have the slightest bearing in the world" (J.A. 24). Indeed, the trial judge not only failed to make the detailed inquiry, but expressly refused to do so (J.A. 22): "I am not passing any judgment on whether you are right, Mr. Appleman is wrong, or vice-versa . . . ."

There was ample time and opportunity for an inquiry. The trial was six days away, and the very counsel who was the subject of defendant's allegation stood before the judge in open court, available to answer any and all questions. It would have taken only a moment for the judge to ask counsel to confirm or to refute defendant's allegations regarding his lack of trial experience, his failure to prepare for trial, and the other matters. Yet, the district judge failed to take even the minimal step which due regard for defendant's Sixth Amendment rights and the proper administration of criminal justice required.[18]

Under the circumstances, the conclusion to be drawn is the same as this Court's conclusion in *United States v. Morrissey*, 461 F.2d 666, 670 (2nd Cir. 1972): "Without more, this failure to inquire, in our view, would constitute error sufficient for reversal of the judgment of conviction."

C. The Trial Record Demonstrates that Defendant's Reasons for a Continuance and Change of Counsel Were Well Founded.

In *Morrissey*, the Court considered it necessary to determine whether there was in fact "more." It therefore turned to a review of the trial record and concluded that "the record as a whole indicates that Morrissey's reasons for a change of counsel were insubstantial" (461 F.2d at 670).

Unlike *Morrissey*, the record here shows conclusively that defendant Wolf's reasons for a change of counsel were not

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[18] The judge seemed far more concerned with defense counsel's sensibilities than with protecting defendant's rights. Thus, the court stated: "Mr. Appleman, I regret exceedingly the position in which you find yourself; it is a very delicate one, and I certainly don't want to add further to the delicacy of your situation . . ." (J.A. 22-23).

insubstantial. Thus, as in *MacKenna v. Ellis*, 280 F.2d 592, 600 (5th Cir. 1960), counsel seriously lacked trial experience and skill, which showed up in his inability to cope with documentary evidence, to formulate questions, and to offer appropriate objections and motions to strike. Defense counsel proved to be the classic example of what Chief Justice Burger has termed "a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." Burger, *The Special Skills of Advocacy*, The Fourth John F. Sonnett Memorial Lecture, at 11 (1973). Indeed, defense counsel was the type of lawyer the Chief Justice must have had in mind when he noted that "a majority of the lawyers have never learned the seemingly simple but actually difficult art of asking questions so as to develop concrete images for the fact triers and to do so in conformity with rules of evidence" and that "[f]ew lawyers have really learned the art of cross-examination, including the high art of when not to cross-examine" (*id.* at 12).

Similarly, as in *Caraway v. Beto*, 421 F.2d 636 (5th Cir. 1970), counsel here demonstrated clearly his failure to prepare adequately for trial. As stated by the court in *Caraway* (*id.* at 637-38):

> "Certainly, an attorney cannot render reasonably effective assistance unless he has acquainted himself with the law and facts of the case. [Citations omitted.] Our adversary system is designed to serve the ends of justice; it cannot do that unless accused's counsel presents an intelligent and knowledgeable defense. Such a defense requires investigation and preparation."

Finally, as in *Brown v. Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970), defendant was forced into a trial with an attorney with whom he was dissatisfied, against whom he

bore hostility, and with whom he had great conflict and great difficulty in cooperating. The prosecutor himself recognized that counsel's concern was primarily with his own interest rather than his client's (*see* Tr. 3). Prior to defendant's taking the stand, counsel committed the grave indiscretion of disclosing to the court and making as part of the record the fact that Dr. Wolf was taking the stand against the advice of counsel (Tr. 783). As the American Bar Association has stated in Section 7.7(c) of its Criminal Justice Standards Relating to the Defense Function:[19]

> "[T]he lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner *without revealing the fact to the court*" (emphasis added).

Unlike any other case that we have found, the present case shows serious problems with defense counsel in *all three* areas of concern – trial experience, trial preparation and the client-attorney relationship. In view of the record evidence, failure of the court to grant a continuance so that defendant could secure new counsel of his choice, or at the least the failure of the court to make a searching inquiry into the reasons presented by defendant, clearly constitutes error sufficient for reversal of the judgment of conviction.

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[19] ABA Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function*, The Defense Function §7.7(c), at 275 (Approved Draft, 1971).

D. Intensely Practical Considerations Highlight the Need for a Trial Judge To Be Particularly Sensitive to Charges that Counsel Lacks Trial Experience and Has Made Inadequate Trial Preparation.

Nothing could be more prejudicial to the interests of the defendant, to the court itself, and to the due administration of criminal justice than defense counsel's lack of experience and preparation in the arena of the criminal jury trial. The Chief Judge of this Court has been in the vanguard of those who have commented in no uncertain terms on the debasement of the entire process of criminal justice occasioned by counsel's lack of trial experience. In *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974), Judge Kaufman notes:

> "In our adversary system, the quality of justice dispensed by the courts is ultimately dependent on the quality of advocacy provided by the bar. If lawyers fail as advocates for want of skill or dedication, then judges surely will fail as well, and the coin of justice will be debased beyond recognition. This interdependence of bench and bar is the linchpin of our legal system. Contemporary developments make this relationship even more crucial."

In the present case, the trial judge himself, well-intentioned as he may have been, apparently resolved doubts with respect to defendant's representation by erroneously assuming that he himself could compensate for any deficiencies. As he stated at the pretrial conference (J.A. 26):

> "I propose to see that the trial is fairly conducted and that you are given every opportunity to establish your innocence. But the trial has to commence as scheduled on Tuesday, November 13."

And throughout the trial, the judge constantly instructed counsel as to such problems as the mechanics of putting a document into evidence, the way to refresh recollection, the use of grand jury minutes, and the proper method of cross-examination, and constantly attempted to compensate for counsel's lack of preparation by such actions as giving time to secure documents not previously subpoenaed and by volunteering opportunities to counsel to make offers of proof. But these actions by the judge did not offset the poor quality of defense representation. As Chief Judge Kaufman stated in his recent article (60 A.B.A.J. at 176):

> "To put it bluntly, judges cannot compensate for lawyers who do not present their clients' cases as well as wit and effort allow. It is not the judge's task to marshal arguments, find citations, distinguish other apparent precedent, and present the facts without the aid and guidance of counsel. To the extent we are able to do it at all without that help, it will be at the expense of practicing our craft of judging."

The Chief Judge has noted that increasing instances of poor legal representation have been coming to the courts' attention, and that "[t]oo many lawyers come into court today with only a diploma to justify their claims to be advocates. They are untrained and unsupervised in the immensely practical work of litigation" *(id.)*. In words which seem highly pertinent here, he stated that "there is simply no substitute for experience. 'On-the-job-training,' as the chief justice calls it, will no longer do" *(id.)*.[20]

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20 *See* Burger, *The Special Skills of Advocacy*, The Fourth John F. Sonnett Memorial Lecture, at 10 (1973) ("The trial of an important case is no place for on-the-job-training of amateurs except under the guidance of a skilled advocate.").

With this increasing open judicial recognition that so many trials are conducted by unqualified counsel, it is ironic that the trial judge here, in the face of a specific challenge to counsel's trial experience and preparation did not pursue any inquiry at all. Now, more than ever before, while broad efforts to deal with the problem go forward, it is crucial that the trial judge's duty to *inquire* in advance of trial into dissatisfaction with the qualifications and performance of counsel be strictly enforced. In the present case, the judge's failure to do so warrants reversal and remand.

II

THE CHARGE TO THE JURY WAS FUNDAMENTALLY UNFAIR SINCE IT SINGLED OUT THE DEFENDANT'S INTEREST AND CREDIBILITY WITHOUT BALANCING THE EMPHASIS BY REFERRING EXPLICITLY TO THE INTEREST AND CREDIBILITY OF THE GOVERNMENT WITNESSES AS WELL.

A. The Charge.

The court delivered an abstract charge on the question of the effect of a witness' interest on his credibility (Tr. 1021):

> "If anyone is found by you to have any interest in this matter, this is a factor which you may take into account in determining the credibility of that witness."

However, with the one exception of a specific reference to the defendant himself, the charge made no other specific references to witnesses on either side (*see* Tr. 1019-21). As for the exception, the court chose to single out the defendant (Tr. 1021):

> "Obvicusly a defendant has a deep personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. Interest creates a motive for false testimony. The greater the interest, the stronger the motive, and the interest of a defendant in the result of his trial is of a character possessed by no other witness."[21]

B. The Meaning of *Reagan*.

We recognize that this Court, on the authority of *Reagan v. United States*, 157 U.S. 301 (1895), has held that "[a]n instruction may properly point out the defendant's special interest in a case." *United States v. Sullivan*, 329 F.2d 755, 757 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964).[22] At the same time, the *Reagan* rule does not mean that, in any and all circumstances, no matter what the context, the defendant's interest may be singled out

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[21] Defendant's relationship with his counsel had so deteriorated that he urged an exception to this portion of the charge himself (Tr. 1029). *See* Part 2(c) of the Statement, *supra*.

[22] The *Reagan* view has, over the years, become increasingly controversial. Thus, Mr. Justice Blackmun, then Circuit Judge, writing for the court in *Taylor v. United States*, 390 F.2d 278, 285 (8th Cir.), *cert. denied*, 393 U.S. 869 (1968), expressed the view that "[W]e would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference [in the general instruction as to all witnesses], such as 'including the defendant,' should suffice." This position was "endorsed" by the First Circuit in *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969), *cert. denied*, 396 U.S. 1028 (1970). *See also United States v. Howard*, 433 F.2d 505, 512 (D.C. Cir. 1970) ("We believe, however, that when the accused testifies in his own behalf, any gratuitous suggestion or implication in instructions, that he is more likely to lie than other witnesses, is to be avoided.").

specifically, while the interests of government witnesses – except for the usual abstract charge on witness interest – remain unmentioned.

The key, as the *Reagan* Court put it, is the requirement that "[t]he court should be impartial [as] between the government and the defendant" (157 U.S. at 310). Thus, at the same time as it noted that the interest of the defendant may be emphasized to the jury, the Court also pointed out (*id.* at 311):

> "And if any other witness for the government is disclosed to have great feeling or large interest against the defendant, the court may, in the interests of justice, call the attention of the jury to the extent of that feeling or interest as affecting his credibility. In the same manner in behalf of the government, the court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them."

The crux of the matter is that the charge must be a balanced one, which gives no undue advantage to one side or the other, for "the limits of suggestion are the same in respect to him [the defendant] as to others [witnesses]" (157 U.S. at 305). This Court has recognized expressly that a *Reagan*-type charge is not *per se* valid but, rather, that "such a charge may be unfair in a given context. . . ." *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. (1966). *See also United States v. Reid*, 410 F.2d 1223, 1227-28 (7th Cir. 1969). The case at bar, we submit, is the one posited in *Mahler*. As we show below, in the context of this trial, the charge was unfair.

C. The Interest and Credibility of the Government Witnesses.

In the present case, the testimony of the two key government witnesses – Rita Milcznski, the defendant's former secretary, and Benjamin Edelstein, the defendant's accountant – raised serious questions as to their credibility.

The secretary, who testified with respect to record-keeping procedures in the defendant's office and whom the defendant claimed he had discharged (Tr. 836-37), admitted that she had lied under oath in her initial interview with a special agent of the Internal Revenue Service; that she had then changed her testimony when called before the Grand Jury (Tr. 314, 326-29); that she had never reported the payments from defendant for her secretarial services as income on her tax returns (Tr. 324); and she had attempted to blame the defendant for this omission (Tr. 324-25). Moreover, up to the time of her testimony, the Internal Revenue Service had taken no action respecting her admitted derelictions (Tr. 345, 348; *see* Tr. 979-80).

The accountant, Edelstein, had prepared the returns in question and had a plain interest in dissociating himself from any alleged fraudulent entries. His testimony sought to portray the defendant as solely responsible for entries on the returns and, after the investigation commenced, he had obtained from the defendant an allegedly incriminating letter (G. Ex. 15, J.A. 33), which he had promptly delivered to the agents (Tr. 493-94). At the trial, questions were raised whether the accountant himself had fabricated the defendant's business deductions (*see, e.g.*, Tr. 68-71, 85-87, 113-15); whether he himself was responsible for failing to report defendant's fees reported on Treasury Form 1099 as part of defendant's gross income (*see, e.g.*, Tr. 369, 381-83, 394); and in effect whether he had exercised the proper diligence and due care required by regulations of the Treasury Department in preparing defendant's returns (*see,*

e.g., Tr. 361-64; D. Ex. G, J.A. 38), The accountant's interest in avoiding implication in the alleged fraud and in preserving his CPA license and the right to practice before the Treasury was clear.

In summation, the prosecutor placed considerable emphasis on the credibility of these two key witnesses (*see, e.g.*, Tr. 961, 965-68, 976-80) and, at the same time, savagely attacked the defendant's credibility (*see, e.g.*, Tr. 958-59, 963-67, 975a, 987). Defense counsel, in his summation, questioned the credibility of these two key government witnesses as well as that of the Special Agent of the Internal Revenue Service (*see, e.g.*, Tr. 926, 931-33, 937-39, 939-40). These arguments on credibility to the jury – but not, of course, their merits or demerits – were part of the "given context" (*United States v. Mahler*, 363 F. 2d 673, 678 (2d Cir. 1966)) in which the judge's charge to the jury was received.

D. The Requirement of a Balanced Charge.

That "context" comes down to this: key government witnesses plainly had an interest in the prosecution; their credibility had been challenged by the defense, buttressed by the prosecution, and made the subject of argument in summations. At the same time, the defendant's credibility had been challenged and was similarly made the subject of argument to the jury. In this context, the charge singled out the issue of the defendant's credibility in the strongest terms, expressly stating that the defendant had the greatest "motive for false testimony" (Tr. 1021). No reference whatever was made explicitly to the interest of government witnesses to balance the emphasis placed on the question of the defendant's credibility. The balance of the charge relating to interest of witnesses was the usual abstract charge which did not focus specifically on witnesses for either side.

In these circumstances, the charge presented an unbalanced picture to the jurors of the various issues of credibility before them and breached the judge's duty to be "impartial [as] between the government and the defendant." *Reagan v. United States,* 157 U.S. 301, 310 (1895).[23] Specific questions relating to the reliability of testimony were brought to the jury's attention regarding the defense case only. In contrast, this court in *Mahler* found that singling out the defendant in the charge was not unfair because, among other things, the judge also had instructed the jury that "key government witnesses also had an interest in the outcome of the case, that their testimony and Mahler's both had to be 'weighed with a great deal of care' and that the jury had to determine whose version to accept" (363 F.2d at 678). These balancing elements were all absent from the charge under review. This lack of balance rendered the charge unfair. Under *Mahler,* therefore, reversal of the judgment below is in order.[24]

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[23] As Mr. Justice Brewer, the author of the *Reagan* opinion, stated in his dissenting opinion in *Hicks v. United States,* 150 U.S. 442, 460 (1893): "It is the duty of the trial court to hold the scales even between the government and the defendant, and, generally speaking, what it may and ought to do on the one side it may and ought to do on the other."

[24] The defense submitted no request to charge on the subject of the interest of witnesses (*see* Ct. Ex. 3 & 5, J.A. 43-46). This omission was but another facet of counsel's inexperience and ineptitude documented in Part 2 of the Statement, *supra.* Despite this omission by defense counsel, defendant himself took exception to the charge to "the strong way" in which motive to testify falsely had been put (Tr. 1029). The unfair tipping of the scales by the judge – "to whose lightest word the jury, properly enough, give a great weight" (*Reagan v. United States,* 157 U.S. 301, 310 (1895)) – substantially affected the defendant's rights. In the circumstances, we submit that this Court can and should take notice of the error.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of conviction below and remand the cause for a new trial.

Respectfully submitted,

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March, 1974.

No. 74-1194

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT L. WOLF,

Appellant

Appeal from the United States District Court
For the Southern District of New York

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief for Appellant was hand delivered by messenger to Bobby C. Lawyer, Assistant United States Attorney, United States Court House, Foley Square, New York, New York, Attorney for the United States, this 13th day of May, 1974.

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